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No. 90-1920

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In The

Supreme Court of the United States

October Term, 1991

MARVIN DIERSCHKE AND JANIS DIERSCHKE,

Petitioners,

v.

WALTER O'CHESKEY, TRUSTEE, et al.,

Respondent.

Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Fifth Circuit

RESPONDENT WALTER O'CHESKEY, TRUSTEE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether section 522(c) of the Bankruptcy Code of 1978 prohibits the Bankruptcy Court from requiring debtors to sell or grant real property in the form of an easement, exempt under state homestead laws, to third parties for the benefit of unsecured creditors after the debtor's exemptions have been allowed under § 522(1) of the Bankruptcy Code.

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STATUTE

11 U.S.C. § 522(c) 2, 3

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, WALTER O'CHESKEY, CHAPTER 12 BANKRUPTCY TRUSTEE, ("TRUSTEE"), respectfully filed this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Marvin Dierschke and Janis Dierschke.

INTRODUCTION

This is an appeal of a decision in Bankruptcy Court in granting an easement across debtor's homestead exempt property so that land could be sold to a buyer of non-exempt farm land in accordance with debtor's plan of reorganization.

STATEMENT OF THE CASE

The Trustee in order to sell the property for the benefit of the creditors filed a motion to have an easement for ingress and egress granted across debtor's exempt land. The question of the Court's jurisdiction was not raised. The Trial Court in applying Texas law by judgment granted an easement by necessity finding all the elements required under Texas law.

Appellants raise a constitutional question for the first time in this Writ, in fact not at the District Court or Circuit Court of Appeals level did Appellant raise the question raised to this Court concerning constitutionality.

The fact question argued by Appellant throughout has been whether the Court should have found a prescriptive easement to exist across a third party's land that was not a party to the hearing or bankruptcy proceedings. The Bankruptcy Court and the District Court held that the trial court had no evidence before it for a prescriptive easement.

REASONS FOR DENYING THE WRIT

Applicants for the first time raise the question concerning the Bankruptcy Court's being prohibited under Section 522(c) of the Bankruptcy Code of 1978 from requiring the debtor to sell or grant real property in the form of an easement.

Section 522(c) was not even mentioned in Appellant's Brief to the District Court. In a well reasoned opinion the District Court affirmed the easement finding "The question of necessity is one of mixed law and fact, and therefore normally for the fact finder." *Mitchell v. Castellair,* 246 S.W.2d 163, 168 (Tex. 1952).

"The Court found that the Bankruptcy Court did not abuse its discretion in reaching its decision to order an easement by necessity across Debtor's homestead; and that there was sufficient support in the record to affirm the 'Order Granting Trustee's Motion to Compel Debtors to grant an easement by necessity.' 'An easement does not convey property itself.' *Lakeside Launches v. Austin Yacht Club,* 750 S.W.2d 868, 871 (Tex. App. – Austin, 1988, writ denied), so there has been no taking of Debtors' property." Certainly no exempt property has been liabled with

any debt of the debtors that arose, or that was determined under Section 522 of the Code.

Appellants again failed to raise Section 522(c) of the Bankruptcy Code in their Statement of Issues and Brief on Appeal to the 5th Circuit. The Fifth Circuit Court of Appeals held that "because an easement entails only a use of the servient estate and not a conveyance of the estate itself, the District Court properly ruled that no forced sale occurred to violate the protection offered by Texas homestead law.

The interpretation of Section 522(c) was within the jurisdiction of the Bankruptcy Court therefore jurisdiction as to its application was proper.

Homesteads in Texas have long been subject to easement by necessity. The easement granted does not subject the homestead to claims of creditors but in fact under 522(c) washes the claims of all creditors away.

CONCLUSION

This Court should deny the Writ of Certiorari for the reason that Appellants have failed to demonstrate that any statutory or constitutional right has been denied Debtors.

Respectfully submitted,

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